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Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

EDWARD M. DUMANIS and NADYA DUMANIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether petitioner was oppressed and abused at trial in the United States Tax Court by a judge who was biased against pro se litigants, in violation of petitioner's due process rights, and if so, whether this substantially affected the Tax Court's judgment against petitioner.

Whether a pro se litigant should be held to less legalistic and stringent standards at trial with respect to court rules and procedure and, in particular, what is the test or standard of compliance with court rules and procedure.

PARTIES TO THE PROCEEDING

Petitioners are Edward Dumanis and Nadya Dumanis, who are husband and wife. At trial in the Unites States Tax Court, it was Edward Dumanis who presented the case and Mrs. Dumanis agreed with everything he stated. For the purposes of clarity, the rest of this petition will refer to the petitioners as "petitioner".

Respondent is the Commissioner of Internal Revenue.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion (App. A) is reported at *Edward M., Nadya Dumanis v. Commissioner of Internal Revenue*, 182 F.3d 899 (2nd Circuit 1999). The United States Tax Court opinion is unpublished and attached at App. B and the order as App. C.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 7, 1999. The Court of Appeals entered an order denying a timely petition for rehearing and petition for rehearing en banc on February 4, 2000. App. D.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The Fifth Amendment states in pertinent part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law".

STATEMENT OF THE CASE

Petitioner, Edward Dumanis, is a Russian born immigrant. He became a United States citizen in 1988. Since that time, he formed a business, Expert Quality, Inc., which mostly provides translation and interpreting services.

On February 28, 1997, Petitioner received a notice of deficiency from respondent. The notice disallowed in full several deductions on petitioner's 1993 and 1994 federal income tax returns. As the cost for an attorney was more than the amounts of the claimed deficiencies, the petitioner chose, as was his right, to represent himself. On his own, the petitioner timely filed a petition with the Tax Court contesting the notice of deficiency and respondent answered the petition.

On February 4, 1998, the Notice of Trial was sent to both parties to which was attached a Standing Pre-Trial Order of the Tax Court. The matter came to trial on April 27, 1998 before the Hon. Robert N. Armen, Jr.

A. Proceedings Below

At the trial of the case, petitioner appeared pro se. The trial judge, a former IRS prosecutor, ruled early in the trial that much of petitioner's evidence would not be admissible due to the fact that petitioner had not complied with the court's standing pre trial order, which dictated that all documents being used at trial must be turned over to the other party at least 15 days before the trial session. Petitioner was also frequently admonished by the judge throughout the trial for failing to comply with court orders and procedure. Petitioner was also not heard on several key issues during the trial. Due to these factors, petitioner was unable to present most of his evidence to prove his case.

Consequently, in a decision entered May 12, 1998, the Tax Court sustained the respondent's deficiency determinations. App. B at 8a.

Petitioner appealed the decision of the Tax Court to the Second Circuit Court of Appeals, pursuant to 26 U.S.C.A. § 7482. The main arguments of petitioner's brief were that:

(1) The Tax Court should have applied less stringent standards in dealing with a pro se litigant;

(2) The Tax Court denied petitioner his procedural due process rights at trial; and

(3) the Tax Court Judge was biased against the pro se petitioner.

The Second Circuit Court of Appeals, in a summary order, affirmed the Tax Court judgment which was being appealed by the petitioner. App. A at 1a.

Petitioner thereafter filed a petition for panel rehearing and a petition for rehearing en banc.

By order, dated February 4, 2000, the Second Circuit Court of Appeals denied the petition for panel rehearing and petitioner for rehearing en banc. App. D at 35a.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE SECOND CIRCUIT REGARDING:

BIAS OF THE TAX COURT JUDGE AGAINST THE PRO SE LITIGANT

The decision of the Second Circuit cannot be reconciled with various decisions of the Supreme Court and with prior decisions of the Second Circuit, as well as other circuits involving the same issue.

Taylor v. Hayes, 418 U.S. 488 (1974), applies to the instant case regarding a disinterested and fair tribunal. In *Taylor*, this Court examined the attitude and bias of a trial judge in relation to his conduct at trial towards the defense counsel, whom the judge repeatedly charged with contempt of court. This Court noted that "as the trial progressed, there was a mounting display of an unfavorable personal attitude towards petitioner, his ability, and his motives, sufficiently so that the contempt issue should have been finally adjudicated by another judge." *Id.* at 501.

Additionally, in *Marshall v. Jerrico*, 446 U.S. 238 (1980), this Court also emphasized how "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Id.* at 242.

A. The Judge's Attitude and Treatment of the Pro Se Petitioner

In the case at bar, the Second Circuit ruled that it sees "no basis for inferring that the tax court judge was biased against petitioner." App. A at 2a. Such an assertion cannot be reconciled with *Taylor* or *Marshall*.

A thorough reading of the trial transcript makes it abundantly clear that the tax court judge was biased, oppressive, argumentative, and demeaning towards the pro se petitioner. The judge curtailed the free flow of arguments, as well as any possibility of a fair trial or an impartial and disinterested tribunal to which petitioner is entitled. *See Marshall*, *supra*, 446 U.S. at 242 (1980). For a pro se litigant, a trial itself is usually an intimidating and daunting experience, even with a helpful and pleasant judge. It is even more intimidating with an oppressive and hostile judge, especially for the petitioner, who was not born and raised in the United States, and whose command of the English language is very certainly inferior to that of a native speaker of English.

Petitioner's original brief to the Second Circuit cites the countless rude and sarcastic remarks made by the trial judge to the petitioner. (Pet'r Br., pp. 27-29; J.A., pp. 31-33, 36, 37, 49, 56, 57, 60, 61, 63, 64.) The Second Circuit, ignoring the rude and sarcastic comments, attempted to explain some of the cited colloquy as "instances in which the court had asked a specific question and Dumanis commenced a statement that was not responsive." App. A at 2a. The Second Circuit either ignored or clearly misapprehended those remarks. A tax court judge should not be making sarcastic comments, nor should he be asking sarcastic questions, to a

pro se litigant, because sarcastic questions may be interpreted as requiring a response not to the actual question, but rather to the source of the sarcasm.

At no time during the trial did petitioner give a non-responsive answer to any question posed to him. Furthermore, even assuming, *arguendo*, that the tax court judge tried to elicit a responsive answer from petitioner at some point, it does not explain, or excuse, why the judge demeans and makes fun of petitioner's lack of understanding trial procedure. It is incomprehensible how the trial in tax court can be considered fair and impartial in light of the flippant and offensive remarks from the tax court judge. These remarks facilitated the oppressive nature of the trial to such a point where petitioner believed it was useless for him to even offer any more of his evidence to prove his deductions, because the judge would just refuse to admit it.

Any judge or attorney, familiar with the conduct of trials, cannot help but be shocked by what occurred at the trial in tax court. Of great significance is the fact that petitioner was completely alone when appearing at trial. He had no attorney, nor any help, in defending himself against the onslaught of oppressive and demeaning remarks from the tax court judge, a former IRS prosecutor. The conduct of the tax court judge below cannot possibly be considered the impartial and disinterested tribunal to which the pro se petitioner is entitled. *See Marshall*, *supra*, 446 U.S. at 242.

Incredibly, the decision of the Second Circuit does not address petitioner's arguments concerning the record of the trial court judge, Hon. Robert N. Armen, Jr., in ruling against pro se litigants (in 26 published pro se cases, the judge always ruled in favor of the CIR, except for *one case* (for an

insignificant amount). His record clearly shows the prejudicial effects of the pro se cases before him and the resulting likelihood of bias against pro se litigants. (Pet'r Reply Br., pp. 13-14.) The Second Circuit's decision failed to even address this issue.

Arguably, any one of the judge's remarks cited in petitioner's brief, standing alone, may not, to the objective reader, be so shocking as to infer bias. However, *all* of the rude and sarcastic remarks, which occurred throughout the trial, *made to a pro se litigant*, and coupled with Judge Armen's record with pro se litigants, cannot possibly be construed as anything but bias on the part of the tax court judge. *See Taylor*, *supra*, 418 U.S. at 501-504; *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995). The judge literally bullied and hurried the petitioner through very critical issues in the trial to such an extent that petitioner was completely persuaded that it was useless for him to offer any more of his evidence. (Pet'r Br., p. 20.) In light of the judge's attitude and comments, petitioner had absolutely no chance of receiving a fair trial, let alone in succeeding in proving his case.

When examining the trial itself, coupled with the record of Judge Armen ruling against pro se litigants, bias is no longer a question, but a certainty. As a result, petitioner has been denied his Fifth Amendment right to a fair and impartial tribunal. *See Marshall*, *supra*, 446 U.S. at 242; *Taylor*, *supra*, 418 U.S. at 501-504; *Stivers*, *supra*, 71 F.3d at 732.

B. Prejudgment of the Issues by the Tax Court Judge

Most importantly, the decision of the Second Circuit does not address petitioner's argument that the tax court judge prejudged the issues.

The record is complete with numerous accounts showing that the judge prejudged several, highly critical issues (*e.g.*, the admittance of petitioner's Exhibit Three, discovery from respondent, whether the notice of deficiency was arbitrary and capricious, the correctness of the government's allowances.) Often times, this occurred before the petitioner is even heard, (J.A., pp. 60-61), or, incredibly, before any evidence is even submitted. (J.A., p. 40.)

The case law is clear that such prejudgment may be demonstrative of bias, particularly when coupled with the rest of the trial itself and the surrounding circumstances (*e.g.*, Judge Armen's pro se record). *See Stivers*, *supra*, 71 F.3d at 741. However, the Second Circuit's decision fails to address these instances of prejudgment or offer any explanation as to how such instances can possibly be considered indicative of a fair and impartial tribunal.

C. Lack of Fundamental Trial Procedure

The Second Circuit also fails to offer any explanation for the outrageous lack of proper trial procedure facilitated by the tax court judge.

As shown in petitioner's brief, the judge hastily and improperly denies petitioner's motion for a continuance in order to subpoena witnesses, (Pet'r Br., p. 23; J.A., p. 21); the judge fails to give petitioner an opening statement but

does, however, give the respondent an opening statement, (Pet'r Br., p. 23; J.A., p. 37); the judge allows respondent to examine the official file of the court, but neglects to offer the petitioner the same opportunity, (Pet'r Br., p. 23; J.A., p. 30); and the judge fails to allow argument on whether or not the notice of deficiency was arbitrary and capricious, (Pet'r Br., p. 24; J.A., pp. 34-36.)

These are clear-cut examples of the unfairness of the trial in tax court and the outright bias of the trial court judge. These examples set the stage for the rest of the trial, leaving the petitioner oppressed, disillusioned, and disheartened. However, the Second Circuit failed to take this into account and offers absolutely no explanation for the judge's conduct in it's decision.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE SECOND CIRCUIT REGARDING:

THE DENIAL OF A PRO SE LITIGANT'S RIGHT TO BE HEARD

The decision of the Second Circuit cannot be reconciled with various decisions of the Supreme Court and with prior decisions of the Second Circuit, as well as other circuits, regarding whether the pro se petitioner was denied a meaningful opportunity to be heard.

Haines v. Kerner, 404 U.S. 519 (1972), is a case directly on point. As with the case presented here, *Haines* concerned the rights and treatment of a pro se litigant. An inmate's pro se complaint became subject to a dismissal for failure to state a cause of action. This Court noted that the complaint of a pro se party is to be held "to less stringent standards than formal pleadings drafted by lawyers" and that "he is entitled to an opportunity to offer proof." *Id.* at 596.

This Court later affirmed the *Haines* case in *Estelle v. Gamble*, 429 U.S. 97 (1976), which also dealt with a pro se litigant whose complaint was subject to dismissal for failure to state a cause of action.

The decision below also conflicts with previous opinions of the Second Circuit. *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90 (2nd Cir. 1993) concerned a pro se defendant who sought to vacate a default judgment against him (resulting from a failure to serve a timely answer). In reversing the default against the pro se defendant, the *Enron* court stated:

> [C]oncerns regarding the protection of a litigant's rights are heightened when the party held in default appears pro se. A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party from so appearing from waiving a right to be heard because of his or her lack of legal knowledge.

Id. at 96.

Additionally, in *Traguth v. Zuck*, 710 F.2d 90 (2nd Cir. 1983), a lower district court had entered a default judgment against Zuck, a pro se litigant, after he failed to comply with the court's directive, allowing the pro se litigant an extension of time to secure counsel for the purposes of responding to the complaint. Instead, the pro se litigant used that time to serve his own answer rather then employ counsel. The *Traguth* court reversed the district court's judgment, stating that it had "abused its discretion in failing to take into account Zuck's pro se status" and that the court had an obligation "to make reasonable allowances to protect pro se litigants from their inadvertent forfeiture of important rights because of their lack of legal training", and that the right of self representation "should not be impaired by harsh application of technical rules." *Id.* at 95.

A. The Pro Se Petitioner was Denied the Right to be Heard on Specific Issues

In the case at bar, the Second Circuit decision cannot be squared with the above mentioned cases.

The Second Circuit's decision states that "the right of *pro se* litigants to be heard does not imply a right to oral argument on all legal questions" and that "[t]he record does not support the proposition that the tax court refused to allow petitioners to present necessary arguments that were properly proffered." App. A at 3a.

It was *never* the position of petitioner that he should be heard on *all* legal issues. Quite the contrary. Petitioner merely pointed out that, given his pro se status, the court below should have given him the chance to be heard on very specific and extraordinarily determinative issues. *See Enron Oil*

Corp., *supra*, 10 F.3d at 96; *Traguth*, *supra*, 710 F.2d at 95; *Eagle Eye Fishing Corp. v. U. S. Dept. of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994); *Logan v. Zimmerman Brush Co.*, 445 U.S. 422, 437, 102 S. Ct. 1148, 1158 (1982).

1. The Denial of an Opportunity to be Heard on The Notice of Deficiency

Of particular importance during the tax court trial was the issue of whether or not the notice of deficiency was arbitrary and capricious. On this issue, the tax court utterly failed to give petitioner a chance to be heard, a chance to establish the notice as arbitrary and capricious, and thereby shift the burden to the government to prove otherwise. *See Portilo v. Commissioner*, 932 F.2d 1128, 1133 (5th Cir. 1991); (Pet'r Br., p. 24; J.A., pp. 34-36.) Clearly, this was a necessary and essential argument at the trial below, and petitioner should have been given the right to be heard at least on this one, critical legal issue. The tax court below, however, failed to give petitioner the chance, and the Second Circuit has simply ignored the issue in it's decision.

2. The Denial of an Opportunity to be Heard on Showing Good Cause

The tax court also failed to give petitioner any opportunity to show good cause for his 300 toll receipts. The court had found them non-admissible under the standing pretrial order. It is abundantly clear from the comments of the tax court judge that he simply did not want to take the time to hear petitioner on this issue: "Now, we are not going to sit here and go through 300 receipts." (J.A., p. 57.) Such comments by the judge are blatant denial of petitioner's constitutional rights. Petitioner had the evidence to prove his case but was flatly denied the chance to present it or be heard.

In these instances, the conduct of the tax court is *not* demonstrative of the meaningful opportunity to be heard guaranteed all pro se litigants. *See Eagle Eye Fishing Corp., supra*, 20 F.3d at 506; *Logan, supra*, 445 U.S. at 437; *Enron Oil Corp., supra*, 10 F.3d at 96. Indeed, the tax court's conduct (*e.g.*, the failure to hear petitioner's arguments, the sarcastic remarks) created an outright demeaning and oppressive atmosphere for the pro se litigant, a recent immigrant from Russia. The oppressive nature of the trial reached such an extent that petitioner was persuaded that it was useless to offer any further evidence or even to speak at times. Such an oppressive attitude from the court would frighten even the most experienced trial attorney. It clearly disheartened and discouraged the pro se petitioner. Yet, the Second Circuit has simply ignored this outright violation of petitioner's right to be heard, as well as its previous decisions on this issue, and those of this Court.

B. The Standing Pretrial Order

The decision of the Second Circuit also discusses petitioner's failure to comply with the standing pre-trial order. The decision makes one particular statement which shows beyond a doubt that the Second Circuit overlooked what occurred at the trial court below, and that it failed protect the rights of the pro se petitioner. *See Enron Oil Corp., supra*, 10 F.3d at 96; *Traguth, supra*, 710 F.2d at 95.

The Second Circuit's decision states in part:

> [T]he tax court indicated that it would allow petitioners to introduce documents as counsel for the Commissioner had already seen; petitioners do not dispute that they had in their possession at

> trial a copy of the Commissioner's entire administrative file. Thus, the tax court offered to excuse petitioners' default in part. To the extent that the tax court otherwise enforced the pretrial order, it did not deny petitioners a fair trial.

App. A at 3a.

The Second Circuit was in error because: (1) it never examined whether there had actually been a default; and (2) whether the tax court followed up on its offer. Importantly, the Second Circuit committed the same mistake as did the tax court at trial. *It never follows up on the tax court's offer to excuse petitioner's default.* The tax court judge states that if a document was currently in respondent's counsel's files, "then there has obviously been an exchange of documents." (J.A., p. 70.) Yet, the court never follows up on this offer. It never asks petitioner, or respondent's counsel, then and there, what documents of petitioner were in respondent's counsel's file. The tax court, and the Second Circuit, should have made some effort to protect the rights of the pro se litigant on this issue.

Moreover, the Second Circuit has failed to take into account respondent's counsel's conduct on this issue and its negative impact on petitioner. Immediately prior to the court's offer, petitioner had offered into evidence Exhibit Three (a list of dates and client ID numbers used during a previous audit), (J.A. p. 48), as well as Exhibit Four (a computer toll summary), (J.A., pp. 66-67). Petitioner then listened to respondent's counsel deny that he had ever seen them. (J.A., pp. 48, 66-67.) Petitioner had personally seen these documents in the hands of respondent's counsel well in advance of trial. (J.A., p. 47.) At that point, petitioner,

completely disheartened by all of the oppressive conduct which preceded this specific incident, felt any further offer of his evidence (specifically, two bankers boxes of documents) was pointless and useless because he knew respondent's counsel would simply deny previously seeing those documents as well. Note that it was not until the end of the trial when respondent's counsel suddenly remembers seeing Exhibit Four prior to trial: "Your Honor, I believe there is a similar summary in the administrative file." (J.A., p. 118). After offering to excuse petitioners default, the tax court should have ascertained, *during the trail*, rather than at the end, which of petitioner's documents were previously in respondent's counsel's possession. However, the tax court failed to do so, clearly showing to the pro se petitioner that it was pointless to attempt to submit any further evidence, and thus most of petitioner's evidence was never admitted. (Pet'r Br., p. 20.)

Additionally, one particular sentence of above mentioned excerpt of the Second Circuit's decision, reveals that it made another crucial error in apprehending what exactly the tax court offered petitioner. The Second Circuit's decision stated "the tax court indicated that it would allow petitioners to introduce documents **as counsel for the Commissioner had already seen**". (emphasis added), App. A at 4a.

The Second Circuit failed to realize that not only did the lower court offer to allow petitioner to introduce documents that respondent's counsel had already seen, it offered to allow petitioner to introduce documents that *respondent* (Commissioner of Internal Revenue) had seen as well. The lower court declared at trial: "If respondent has already seen them, if they had been in Respondent's possession before, that may perhaps be another matter. We would have to take that up and see what the situation is." (J.A., p. 70.)

Yet, the lower court *never* follows through on this offer, it never bothers to ascertain which of petitioner's documents may have been in the possession of the respondent. A simple half hour adjournment, after the court's offer, would have been all that was needed. Certainly, a pro se litigant cannot possibly be expected to know that he would have been entitled to such an adjournment, or to speak up in such an oppressive atmosphere as created by the lower court.

As the Second Circuit held in *Enron Oil Corp.*, *supra*, 10 F.3d at 96, trial judges must make some effort to protect pro se litigants from waiving the right to be heard. Incredibly, the tax court judge utterly failed to do this. The judge never gave any indication that petitioner's entire case hinged on this exchange of documents. Petitioner received no warning, no awakening of the consciousness, no advisement from the judge, at any time, that his case was in jeopardy (as is clearly evident from the trial court's decision, App. B at 21a-22a, and that if he did not act immediately he might be waiving his rights. There is no doubt that the trial judge and the respondent's attorney knew exactly what the judge's decision would be in the case. The petitioner was clearly and outrageously "set up" for failure as the conduct of the trial shows.

Unequivocally, the Second Circuit misunderstood what occurred at trial, what the lower court offered to petitioner (and subsequently failed to follow up on), and what the lower court was required to do. The pro se petitioner was denied his constitutional right to be heard and to present his case.

The Second Circuit has also made another error committed by the trial court below, perhaps one of the most crucial. It never bothers to consider the pro se litigant's

alternate, layperson interpretation of the standing pretrial order. The Court's ruling that petitioner had not complied with the order essentially prevented petitioner from offering his evidence at trial. Contrary to the decision of the Second Circuit, petitioner *does* dispute that he failed to comply with the order. Petitioner's interpretation, as a layperson and pro se litigant, was certainly understandable. Respondent even admitted in his brief to the Second Circuit that other interpretations of the order are possible. (Resp't Br., p. 37, n.8.)

The Second Circuit has previously ruled that the right to self-representation should not be impaired by the harsh application of technical rules. *Traguth*, *supra*, 710 F.2d at 95. However, *that is precisely what occurred at the trial*, as the tax court's harsh, legalistic interpretation of the pretrial order prevented petitioner from offering most of his evidence to prove his case.

Petitioner interpreted the pretrial order to the best of his ability. As shown in petitioner's original brief to the Second Circuit, there was nothing unreasonable about petitioner's interpretations, especially in light of the fact that he is a layperson and naturalized citizen, not a native speaker of English, and was appearing pro se at trial. (Pet'r Br., pp. 15-18). According to previous decisions of this Court, the Second Circuit (and other circuits), the petitioner's pro se status, particularly in a tax case, must be considered when contemplating this issue; some latitude or leeway must be given. *See Enron Oil Corp*, *supra*, 10 F.3d at 96; *Traguth*, *supra*, 710 F.2d at 95; *Christenson v. C.I.R.*, 786 F.2d 1382, 1385 (9th Cir. 1986)), *Estelle*, *supra*, 429 U.S. at 106; *Haines*, *supra*, 404 U.S. at 520.

The Second Circuit completely ignored the oppression faced by petitioner as he attempted to prove his case in tax court. The trial judge inexcusably failed to apply the necessary latitude and less stringent standards in dealing with a pro se litigant. The Second Circuit utterly failed to do this as well, and it's decision is in direct conflict with it's previous rulings on this issue, as well as those of this Court. A petition for writ of certiorari is, without a doubt, warranted.

THE ISSUES PRESENTED ARE IMPORTANT, WITH FAR REACHING IMPLICATIONS

The Second Circuit has sent a conflicting message to the petitioner, and indeed, to pro se litigants everywhere.

At trial in the tax court, petitioner attempted to present his case, submit his proof, and comply with court orders and procedure. The tax court consistently failed to take into account petitioner's pro se status, and abused its discretion in failing to allow petitioner to be heard, or even make himself understood. Petitioner was, after all, a layperson and not a native speaker of English, and yet he was held to the higher standard of an experienced trial attorney. He was effectively denied his due process rights as he was not heard on several critical issues at trial. Petitioner had the evidence to prove his case but was prevented from offering it.

The Second Circuit's decision blatantly conflicts with its own prior decisions and with that of this Court. As shown, it has completely overlooked the abuse and oppression petitioner was subjected to at trial. By it's decision, the Second Circuit has now sent a message to each and every Untied States citizen that their rights may not be protected should they choose, as is their right, to represent themselves in court.

Petitioner is an immigrant and now a United States citizen. The decision of the court below has shaken his belief in the legal system of the United States. By affirming the decision of the tax court, the Second Circuit has essentially washed its hands of petitioner's case. It reviewed what occurred at trial and, by it's decision, has essentially implied that it does not care if pro se litigants are abused and oppressed in court.

Petitioner came to the United States with the belief that the rights of all its citizens are protected, particularly in courts of law. Justice warrants that he be afforded his Fifth Amendment rights, which have been denied him by the courts below.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari must be granted.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JULY 7, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

* * *

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventh day of July one thousand nine hundred and ninety-nine.

Present: HONORABLE AMALYA L. KEARSE,

HONORABLE CHESTER J. STRAUB,

HONORABLE ROSEMARY S. POOLER,

Circuit Judges.

No. 98-4350

EDWARD M. DUMANIS, NADYA DUMANIS

Petitioners-Appellants,

– v. –

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

* * *

Appendix A

Appeal from the Tax Court of the United States.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said Tax Court be and it hereby is affirmed.

Petitioners Edward Dumanis ("Dumanis") and Nadya Dumanis appeal from a judgment of the United States Tax Court, following a trial before Robert N. Armen, Jr., *Special Trial Judge*, upholding deficiencies determined by respondent Commissioner of Internal Revenue ("Commissioner") with respect to petitioners' 1993 and 1994 income tax returns. In their main brief on this appeal, petitioners, who proceeded *pro se* in the tax court and are represented by counsel in this Court, argue only that the tax court was biased against them and failed to afford them, as *pro se* litigants, a fair trial. In their reply brief, petitioners challenge the merits of the tax court decision. For the reasons that follow, we find no basis for reversal.

Our review of the record persuades us that petitioners' challenge to the fairness of the proceedings below is without merit. We see no basis for inferring that the tax court judge was biased against petitioners. For example, some of the colloquy quoted by petitioners in support of their contention that the tax court refused to allow them to be heard are plainly, when read in context, instances in which the court had asked a specific question and Dumanis commenced a statement that was not responsive. The court's effort to elicit

responsive answers is not evidence of bias. Further, the right of *pro se* litigants to be heard does not imply a right to oral argument on all legal questions. *See, e.g., Greene v. WCI Holdings Corp.*, 136 F.3d 313, 316 (2d Cir.) (per curiam), *cert. denied*, 119 S. Ct. 448 (1998). The record does not support the proposition that the tax court refused to allow petitioners to present necessary arguments that were properly proffered.

As to petitioners' opportunity to present evidence, a *pro se* litigant, no less than a counseled litigant, "must follow the applicable evidentiary rules and lay the proper foundation for the admission of his documents into evidence, including calling all relevant witnesses." *Moretti v. Commissioner*, 77 F.3d 637, 645 (2d Cir. 1996). *Pro se* litigants are equally bound by disclosure requirements, and where the litigant fails to comply with such requirements, the court may prevent him from presenting evidence at trial. *See id.* at 641, 644 (pre-trial order requiring parties to exchange documents before trial enforceable despite petitioner's claim that evidence "had only recently been obtained"). In the present case, it is undisputed that petitioners failed to comply with a pretrial order that "[a]ny documents or materials which a party expects to utilize in the event of trial (except for impeachment), but which are not stipulated, shall be identified in writing and exchanged by the parties at least 15 days before the first day of the trial session." That order also stated that "[t]he Court may refuse to receive in evidence any document or material not so stipulated or exchanged, unless otherwise agreed by the parties or allowed by the Court for good cause shown." Although petitioners contend here that the enforcement of this order denied them a fair trial

because they were confused as to whether they were required to exchange documents that were in the Commissioner's file or that they had shown to the auditor, they offered various other explanations in the tax court, stating principally that they had spent the bulk of their time preparing to show that the notice of deficiency was arbitrary and capricious, and that "when [Dumanis] found all the papers and w[as] able to make a presentation of [that] issue, there was no time to do through [*sic*] the presentation of the material to exchange with the Respondent the materials . . . ." Further, notwithstanding petitioners' failure to provide the required 15 days' advance notice to the Commissioner of the documents they would offer at trial, and notwithstanding their failure to proffer a good reason for their failure, the tax court indicated that it would allow petitioners to introduce such documents as counsel for the Commissioner had already seen; petitioners do not dispute that they had in their possession at trial a copy of the Commissioner's entire administrative file. Thus, the tax court offered to excuse petitioners' default in part. To the extent that the tax court otherwise enforced the pretrial order, it did not deny petitioners a fair trial.

In their reply brief, petitioners for the first time challenge the merits of the tax court's decision. This challenge is not properly before us, as an appellant is required to set out "a statement of the issues presented for review," Fed. R. App. P. 28(a)(5), and the "appellant's contentions and the reasons for them," *id.* 28(a)(9)(A), in his main brief. A challenge may not be made for the first time in the appellant's reply brief. *See, e.g., Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993).

Appendix A

We have considered all of petitioners' contentions that are properly before us and have found in them no basis for reversal. The judgment of the tax court is affirmed.

FOR THE COURT:
KAREN GREVE MILTON,
Acting Clerk
by:

s/ Ralph A. Anderson
RALPH A. ANDERSON,
DEPUTY CLERK
ACTING OPERATIONS
MANAGER

APPENDIX B — DECISION DATED AND ENTERED MAY 12, 1998 AND TRANSCRIPT OF BENCH OPINION DATED APRIL 28, 1998 OF THE UNITED STATES TAX COURT

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its bench opinion rendered on April 28, 1998, at Buffalo, New York, it is

ORDERED AND DECIDED that there are deficiencies in petitioners' Federal income taxes for the taxable years 1993 and 1994 in the amounts of $1,740 and $1,148, respectively.

s/ Robert N. Armen, Jr.
Robert N. Armen, Jr.
Special Trial Judge

ENTERED: MAY 12 1998

Appendix B

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

May 12, 1998

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Notice of Service of Transcript

Pursuant to Rule 152(b), Rules of Practice and Procedure of this Court, there is transmitted herewith to petitioners and respondent a copy of the pages of the transcript of the trial of the above case before Special Trial Judge Robert N. Armen, Jr. at Buffalo, New York, on April 28, 1998, containing his oral findings of fact and opinion rendered at the conclusion of the trial.

In accordance with the oral findings of fact and opinion, decision will be entered for respondent.

s/ Charles S. Casazza
Charles S. Casazza
Clerk of the Court

Appendix B

[commencing at page 3]

EDWARD M. & NADYA DUMANIS

DOCKET NO. 10681-97

APRIL 28, 1998

SPECIAL TRIAL JUDGE ROBERT N. ARMEN, JR.

BENCH OPINION

I.

THE COURT: The Court has decided to render oral findings of fact and opinion in this case, and the following represents the Court's oral findings of fact and opinion.

II.

This proceeding was heard as a regular case pursuant to the provisions of section 7443A(b)(3) of the Internal Revenue Code of 1986, as amended, and Rules 180, 181, and 182 of the Tax Court Rules of Practice and Procedure.

III.

This bench opinion is made pursuant to the authority granted by section 7459(b) of the Internal Revenue Code of 1986, as amended, and Rule 152 of the Tax Court Rules of Practice and Procedure.

Appendix B

Hereinafter in this bench opinion, and unless otherwise stated, all section numbers refer to the Internal Revenue Code, as amended and in effect for 1993 and 1994, the taxable years in issue, and all Rule numbers refer to [4] the Tax Court Rules of Practice and Procedure.

IV.

Edward M. Dumanis and Nadya Dumanis appeared on their own behalf, and Matthew I. Root appeared on behalf of respondent.

V.

Respondent determined deficiencies in petitioners' Federal income taxes for the taxable years 1993 and 1994 in the amounts of $1,740 and $1,148, respectively.

VI.

For the sake of convenience, we shall henceforth refer to petitioner Edward M. Dumanis as petitioner.

VII.

The issues for decision, all of which involve Schedule C deductions claimed by petitioner on his 1993 and 1994 income tax returns, are as follows:

(1) Whether petitioner is entitled to a deduction for automobile expense as claimed on his Schedule C for each of the taxable years in issue;

Appendix B

(2) whether petitioner is entitled to a deduction for rent as claimed on his Schedule C for each of the [5] taxable years in issue;

(3) whether petitioner is entitled to a deduction for meals while away from home as claimed on his Schedule C for each of the taxable years in issue; and

(4) whether petitioner is entitled to a deduction for utilities as claimed on his Schedule C for each of the taxable years in issue.

All of these issues essentially involve substantiation of the deductions claimed.

VIII.

The parties failed to execute a stipulation of facts. See Rule 91; see also Note to Rule 91, 60 T.C. at 1117 (the stipulation process is the "mainstay" of Tax Court practice); *Branerton Corp. v. Commissioner*, 61 T.C. 691, 692 (1974) (the stipulation process is the "bedrock" of Tax Court practice). However, with the Court's assistance, the parties did orally stipulate to venue, as well as to copies of the notice of deficiency and petitioners' income tax returns for the years in issue.

Petitioners resided in the State of New York at the time that their petition was filed with the Court.

During 1993 and 1994, and for several years prior thereto, petitioner was the sole proprietor of a communication

services business known as "Expert [6] Quality/Russian Translation Services". The principal place of business of petitioner's communication services business was 117 Callodine Avenue, Amherst, New York, which petitioner regards as his tax home.

Amherst, New York is a suburb of Buffalo, New York, and 117 Callodine Avenue is a single-family residence that petitioners have owned since 1987. Petitioners listed 117 Callodine Avenue both as their home address on Form 1040 for 1993 and 1994 and as petitioner's business address on Schedule C for 1993 and 1994.

In March 1991, petitioner filed a business certificate with the clerk of Erie County, New York, the county that includes Amherst. The business certificate stated that petitioner was conducting business at 117 Callodine Avenue and that he also resided at such address.

In March 1991, petitioner Nadya Dumanis commenced employment in Rochester, New York as a computer programmer for Eastman Kodak Company. Petitioner Nadya Dumanis worked in this capacity on a full-time basis during 1993 and 1994.

At or about the time petitioner Nadya Dumanis commenced employment in Rochester with Eastman Kodak Company, she and/or petitioner leased a one-bedroom apartment with an address at 176 Greystone Lane, Apt. #3, Rochester, New York. This apartment, consisting of a living room, bedroom, and kitchen, was situated on the first floor [7] of a two-story garden-style apartment building, which,

in turn, was part of a residential apartment complex. Petitioner Nadya Dumanis and/or petitioner continued to lease this apartment through mid-1993. During this period, and in particular in 1993, there was use of this apartment as a residence by petitioner Nadya Dumanis and/or petitioner.

In or about July 1993, petitioner Nadya Dumanis and/or petitioner leased a two-bedroom apartment with an address at 2337 East Ridge Road, Apt. #17, Rochester, New York. This apartment, consisting of a living room, two bedrooms, and kitchen, was also situated on the first floor of a garden-style apartment building, which, in turn, was part of a residential apartment complex. During the last six months of 1993 and during 1994, there was use of this apartment as a residence by petitioner Nadya Dumanis and/or petitioner.

In April 1991, shortly after petitioner Nadya Dumanis had commenced employment in Rochester, New York, petitioner filed business certificates with the clerk of Monroe County, New York, the county that includes Rochester. The business certificates stated that petitioner was conducting business at 176 Greystone Lane #3 and that he also resided at such address.

In July 1993, petitioner filed amended business [8] certificates with the clerk of Monroe County, New York. The business certificates stated that petitioner was conducting business at 2337 East Ridge Road #17 and that he also resided at such address.

Petitioner Nadya Dumanis received a Form W-2 (Wage and Tax Statement) from her employer, Eastman Kodak

Company, for each of the years in issue. The Form W-2 for 1993 discloses petitioner Nadya Dumanis' address as 2337 East Ridge Road, Apt. #17, Rochester, New York. The Form W-2 for 1994 also discloses petitioner Nadya Dumanis' address as 2337 East Ridge Road, Apt. #17.

On their 1993 income tax return, petitioners reported wages received by petitioner Nadya Dumanis from Eastman Kodak Company in the amount of $52,077. In contrast, on Schedule C, petitioner claimed a loss from his communication services business in the amount of $10,224.

Similarly, on their 1994 income tax return, petitioners reported wages received by petitioner Nadya Dumanis from Eastman Kodak Company in the amount of $53,642. In contrast, on Schedule C, petitioner claimed a loss from his communication services business in the amount of $8,405.

Petitioner's Schedule C loss for 1993 was the arithmetic difference between total expenses claimed in the amount of $16,183 and gross income reported in the amount of $5,959. Expenses claimed included deductions for [9] depreciation in the amount of $5,821, rent in the amount of $2,940, meals (after the applicable 20 percent limitation) in the amount of $1,664; and utilities in the amount of $4,948. There was also an expense claimed for advertising in the amount of $81.60.

The deduction for depreciation included two components: (1) a section 179 expense deduction for software and a laser jet fax machine in the total amount of $1,013 and (2) business mileage in the amount of $4,809. The latter component was based on the standard mileage rate of $.28 per business mile

driven times 17,174 business miles. All or some portion of the 17,174 figure apparently represents mileage between Buffalo and Rochester.

The deduction for rent in the amount of $2,940 apparently represents all or some portion of the monthly rent paid for apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester.

All or some portion of the deduction for meals in the net amount of $1,664 apparently represents the costs of meals eaten by petitioner in Rochester while away from home overnight.

The deduction for utilities in the amount of $4,948 apparently represents the cost of all or some portion of the utilities (gas, electric, and telephone) applicable to the business use of 117 Callodine Avenue in Amherst, [10] i.e., $3,388, and the alleged business use of apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester, i.e., $1,560.

Petitioner's Schedule C loss for 1994 was the arithmetic difference between total expenses claimed in the amount of $12,785 and gross income reported in the amount of $4,380. Expenses claimed included deductions for depreciation in the amount of $3,759, rent in the amount of $2,007, meals (after the applicable 50 percent limitation) in the amount of $1,114; and utilities in the amount of $4,998.

The deduction for depreciation included two components: (1) a section 179 expense deduction for computer and office

accessories in the total amount of $828 and (2) business mileage in the amount of $2,932. The latter component was based on the standard mileage rate of $.29 per business mile driven times 10,109 business miles. All or some portion of the 10,109 figure apparently represents mileage between Buffalo and Rochester.

The deduction for rent in the amount of $2,007 apparently represents all or some portion of the monthly rent paid for apartment #17 at 2337 East Ridge Road in Rochester.

All or some portion of the deduction for meals in the net amount of $1,114 apparently represents the costs of [11] meals eaten by petitioner while away from home overnight.

The deduction for utilities in the amount of $4,998 apparently represents the cost of all or some portion of the utilities (gas, electric, and telephone) applicable to the business use of 117 Callodine Avenue in Amherst, i.e., $3,424, and the alleged business use of apartment #17 at 2337 East Ridge Road in Rochester, i.e., $1,574.

In the notice of deficiency, respondent disallowed in full (1) the business mileage component of the depreciation deduction claimed by petitioner on his Schedule C for 1993 and 1994; (2) the rent deduction claimed by petitioner on his Schedule C for 1993 and 1994; (3) the deduction for meals claimed by petitioner on his Schedule C for 1993 and 1994; and (4) that part of the deduction for utilities applicable to the apartments in Rochester claimed by petitioner on his Schedule C for 1993 and 1994. (Parenthetically, we note that in the notice of deficiency, respondent appears to have made

an $8 error in petitioners' favor in disallowing the business mileage component of the depreciation deduction claimed by petitioner on his Schedule C for 1993.)

Before turning to the applicable law, we conclude our findings of fact with the following:

Prior to her employment in Rochester in March 1991 with Eastman Kodak Company, petitioner Nadya Dumanis worked [12] in Detroit, Michigan for Analytical Technologies, Inc. During that period, she and/or petitioner leased an apartment in the Detroit metropolitan area. Also during that period, petitioner purported to conduct his communication services business from that apartment, while continuing to regard Amherst, New York as his tax home. Petitioner also reported losses from his business during that period.

IX.

We turn now to three fundamental principles of tax litigation that guide the decisional process in this case.

First, as a general rule, the Commissioner's determinations are presumed correct, and the taxpayer bears the burden of proving that those determinations are erroneous. Rule 142(a). This principle was firmly established by the United States Supreme Court as early as 1933 and has been reaffirmed by the Supreme Court as recently as 1992. See *INDOPCO Inc. v. Commissioner*, 503 U.S. 79, 84 (1992); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

Second, deductions are a matter of legislative grace, and a taxpayer must satisfy the specific statutory requirements of the deduction claimed. *Deputy v. duPont*, 308 U.S. 488, 493 (1940); *New Colonial Ice Co. v. Helvering*, [13] 292 U.S. 435, 440 (1934). Additionally, a taxpayer is required to substantiate the amount claimed as a deduction by maintaining the records needed to establish such entitlement. See generally sec. 6001; sec. 1.6001-1(a), Income Tax Regs.; *Hradesky v. Commissioner*, 65 T.C. 87, 90 (1975), affd. per curiam 540 F.2d 821 (5th Cir. 1976); see also section 274(d), which sets forth particularly stringent substantiation requirements in the case of travel expense, including meals while away from home, and expenses involving listed property, such as automobiles. We will have more to say about section 274 in a few moments.

Third, the Court is not bound to accept as gospel the unverified and undocumented testimony of a taxpayer. *Hradesky v. Commissioner*, supra; *Tokarski v. Commissioner*, 87 T.C. 74, 77 (1986). Even when a taxpayer's testimony is uncontroverted, we are not required to accept it if it is improbable, unreasonable, or questionable. *Lovell & Hart, Inc. v. Commissioner*, 456 F.2d 145, 148 (6th Cir. 1972), affg. T.C. Memo. 1970-335; *MacGuire v. Commissioner*, 450 F.2d 1239, 1244 (5th Cir. 1971), affg. T.C. Memo. 1970-89; *Niedringhaus v. Commissioner*, 99 T.C. 202, 212 (1992). See *Diaz v. Commissioner*, 58 T.C. 560, 562 (1972) (distilling truth from the testimony of witnesses, whose demeanor we observe and whose credibility we evaluate, is the daily grist of judicial life); see also *Gerardo v. Commissioner*, [14] 552 F.2d 549, 553 (3d Cir. 1977); *Wood v. Commissioner*, 338 F.2d 602 (9th Cir. 1964), affg. 41 T.C. 593 (1964).

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We turn now to the deductions claimed by petitioner on his Schedule C's. We begin with the deductions claimed for automobile expense and meals.

As a general rule, if the record provides sufficient evidence that the taxpayer has incurred a deductible expense, but the taxpayer is unable to adequately substantiate the amount of the deduction to which he or she is otherwise entitled, the Court may estimate the amount of such expense and allow the deduction to that extent. *Cohan v. Commissioner*, 39 F.2d 540, 543-544 (2d Cir. 1930). However, in order for the Court to estimate the amount of an expense, we must have some basis upon which an estimate may be made. *Vanicek v. Commissioner*, 85 T.C. 731, 743 (1985). Without such a basis, any allowance would amount to unguided largesse. *Williams v. United States*, 245 F.2d 559, 560 (5th Cir. 1957).

However, in the case of certain expenses, section 274(d) overrides the so-called *Cohan* doctrine. *Sanford v. Commissioner*, 50 T.C. 823, 827 (1968), affd. per curiam 412 F.2d 201 (2d Cir. 1969); sec. 1.274-5T(a), Temporary Income Tax Regs. Specifically, section 274(d)(1) and (4) provides that no deduction is allowable for travel, including meals while away from home, and with respect to listed property as [15] defined in section 280F(d)(4), unless the deductions are substantiated in accordance with the strict substantiation requirements of section 274(d) and the regulations promulgated thereunder. Included in the definition of listed property in section 280F(d)(4) is any passenger automobile. Sec. 280F(d)(4)(A)(I).

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In order to substantiate a deduction for travel, including meals while away from home, or a deduction attributable to listed property, a taxpayer must maintain adequate records or present corroborative evidence to show: (1) The amount of the expense, (2) the time and place of travel or use of the listed property, and (3) the business purpose for the travel or use. Sec. 1.274-5T(b)(6), Temporary Income Tax Regs.

In order to substantiate a deduction by means of adequate records, a taxpayer must maintain a diary, a log, or a similar record, and documentary evidence which, in combination, are sufficient to establish each element of each expenditure or use. Sec. 1.274-5T(c)(2)(I), Temporary Income Tax Regs. To be adequate, a record must generally be written. Each element of an expenditure or use that must be substantiated should be recorded at or near the time of that expenditure or use. Sec. 1.274-5T(c)(2)(ii)(A), Temporary Income Tax Regs.

Thus, under section 274(d), no deduction may be [16] allowed for travel, including meals while away from home, or expenses incurred for use of a passenger automobile on the basis of any approximation or the unsupported testimony of the taxpayer. E.g., *Golden v. Commissioner*, T.C. Memo. 1993-602.

Petitioner has not complied with the strict substantiation requirements of section 274 insofar as his deductions for automobile and meal expenses are concerned. Indeed, petitioner presented no records at trial regarding either automobile expense or meal expense, and it is unclear from the trial record whether petitioner even maintained the type of records required by section 274.

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Insofar as automobile expense is concerned, petitioner testified that he subtracted the odometer reading at the beginning of the year from the odometer reading at the end of the year and then multiplied the difference by the standard mileage rate. Petitioner testified further that his automobile was used exclusively for business and that there was no personal use of such automobile whatsoever. We do not find this testimony convincing and we do not accept it. Regardless, petitioner's approach does not comport with the strict substantiation requirements of section 274.

Insofar as meal expense is concerned, petitioner testified that he used the Federal meal rate for the [17] locality of his travel and then multiplied that rate on a quarter-day basis times the number of quarter-days that he was away from his tax home in Buffalo overnight. Although use of the Federal meal rate may be appropriate, the trial record in this case does not establish either the time and place of travel or the business purpose for such travel. Once again, the strict substantiation requirements of section 274 have not been satisfied.

We turn now to the deductions claimed for rent and utilities. These deductions relate to apartment #3 at 176 Greystone Lane and apartment #17 at 2337 East Ridge Road in Rochester.

At trial, petitioner testified that the Rochester apartments were leased "primarily" for business use; nevertheless, petitioner testified that only one-half of the expenses actually incurred were deducted. We regard petitioner's testimony as an admission that there was personal use of the Rochester apartments.

Appendix B

We begin by observing that the trial record is devoid of any documentary evidence regarding amounts actually paid for rent and utilities for the Rochester apartments. Indeed, there is nothing in the trial record regarding payment, except for the claims made on petitioner's Schedule C's themselves. However, petitioners' returns are not self-proving as to the truth of their [18] contents. E.g., *Halle v. Commissioner*, 7 T.C. 245 (1946), affd. 175 F.2d 500 (2d Cir. 1949); *Caruso v. Commissioner*, T.C. Memo. 1966-190. Apart from the foregoing, section 280A(a) denies deductions with respect to the use of a dwelling unit used by the taxpayer as a residence during the taxable year. Section 280A(c), however, permits the deduction of expenses allocable to a portion of the dwelling unit that is used exclusively and on a regular basis as "the principal place of business" for any trade or business of the taxpayer, sec. 280A(c)(1)(A), or as a place of business which is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of the taxpayer's trade or business, sec. 280A(c)(1)(B). The first of these exceptions does not apply because petitioner's principal place of business was 117 Callodine Avenue in Amherst. And petitioners failed to prove that the second of these exceptions applied, i.e., petitioners failed to prove that the Rochester apartments were used by clients or customers in meeting or dealing with petitioner in the normal course of petitioner's communication services business.

Even if one of the exceptions set forth in section 280A(c)(1) were applicable, petitioners failed to prove that the limitation of section 280A(c)(5) does not bar the deductions in issue. Specifically, petitioners failed to [19] prove the amount of gross income derived from the use of the Rochester apartments for either of the years in issue.

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Insofar as telephone expense is concerned, we observe that the trial record contains no evidence whatsoever of the amount actually paid for telephone service or advertising in the Yellow pages. (Parenthetically, we note that a deduction for advertising in the amount of $81.60 was specifically claimed on petitioner's Schedule C for 1993.) Moreover, section 262(b) provides that the charges for basic local telephone service with respect to the first line provided to any residence shall be treated as a nondeductible personal expense. See also *Williams v. United States*, supra; *Vanicek v. Commissioner*, supra.

In addition to the various technical reasons that preclude petitioners' entitlement to all of the deductions in issue, i.e., the deductions for automobile expense, meals while away from home, rent, and utilities in respect of the Rochester apartments, there is yet another fundamental hurdle that petitioners have failed to clear. Simply put, petitioners have failed to convince us that Rochester was anything more than the place of employment of petitioner Nadya Dumanis. In other words, petitioners have failed to prove that there was a nexus between Rochester and petitioner's communication services business.

At trial, petitioner admitted that before March [20] 1991, i.e., before petitioner Nadya Dumanis secured employment in Rochester with Eastman Kodak Company, petitioner had only "infrequent" business contacts with Rochester. We suspect that the truth is closer to "virtually no" or "no" such business contacts. Regardless, petitioner never convincingly explained what, from a business point of view, drew him first to Detroit and then to Rochester. The pattern suggested

by the record is that petitioner, whose residence and principal place of business at all relevant times was in Amherst, would establish a "satellite office" in the residential apartment maintained by petitioner Nadya Dumanis, the individual responsible for the family unit's economic well-being, wherever she obtained gainful employment. Further, petitioner never convincingly explained why he would lease a residential apartment in a residential apartment complex rather than office space in an office building.

The suggestion that lingers in the trial record is that petitioners wished to convert personal expense into ostensible business expense. This suggestion, which fundamentally underlies respondent's deficiency determinations, was never overcome by petitioners at trial.

Finally, in closing, we again observe that this is basically a substantiation case. Unfortunately, petitioners failed to produce the requisite proof. With regard to [21] documentary evidence in particular, petitioners introduced only one exhibit, a computer-generated "toll report". This exhibit appears to relate to a deduction not even disallowed by respondent, given the fact that the deductions for automobile expense previously discussed were based solely on the standard mileage rate. In any event, the document does not serve to substantiate any deduction at issue in this case.

In view of the foregoing, we hold that petitioners failed to carry their burden of proof, and we therefore sustain respondent's deficiency determinations. Rule 142(a); *INDOPCO Inc. v. Commissioner*, supra; *Welch v. Helvering*, supra.

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X.

In order to give effect to the foregoing, decision will be entered for respondent.

XI.

This concludes the Court's oral findings of fact and opinion in this case.

[22] [Whereupon, at 12:15 p.m., the bench opinion concluded.]

* * * *

APPENDIX C — ORDER OF THE UNITED STATES TAX COURT DATED AUGUST 12, 1998

UNITED STATES TAX COURT
WASHINGTON, DC 20217

Docket No. 10681-97

EDWARD M. AND NADYA DUMANIS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ORDER

On June 11, 1998, petitioners filed a Motion to Vacate Decision. On July 1, 1998, petitioners filed a Motion for Reconsideration of Opinion after the Court granted their motion for leave to file such motion out of time.

On August 3, 1998, respondent filed a Notice of Objection to petitioners' motion to vacate and motion for reconsideration.

I.

The granting of a post-decision motion, such as a motion for reconsideration or a motion to vacate, rests within the discretion of the Court, and we will not exercise our

discretion absent a showing of unusual circumstances or substantial error of fact or law. E.g., *Vaughn v. Commissioner*, 87 T.C. 164, 166-167 (1986); *Estate of Bailly v. Commissioner*, 81 T.C. 949, 951 (1983); *CWT Farms, Inc. v. Commissioner*, 79 T.C. 1054, 1057 (1982), affd. 755 F.2d 790 (11th Cir. 1985); *Estate of Scanlan v. Commissioner*, T.C. Memo. 1996-414, affd. without published opinion 116 F.3d 1476 (5th Cir. 1997); *Gilman v. Commissioner*, T.C. Memo. 1990-205, affd. 933 F.2d 143 (2nd Cir. 1991). It is the policy of the Court to try all issues raised in a case in one proceeding in order to avoid piecemeal and protracted litigation. *Robin Haft Trust v. Commissioner*, 62 T.C. 145, 147 (1974), affd. on this issue 510 F.2d 43, 45 n.1 (1st Cir. 1975). A post-decision motion will generally not be granted in order to resolve issues that could have been raised during the prior proceeding but are raised instead for the first time in a post-decision motion. E.g., *Stoody v. Commissioner*, 67 T.C. 643, 644 (1977). As we stated in *Koufman v. Commissioner*, 69 T.C. 473, 476-477 (1977):

> This Court has an extraordinarily heavy volume of cases, and in many of them, the Court decides an issue against one of the parties because of his failure to carry his burden of proof or to perform some other act. If the Court granted a second chance to every party who lost because of his failure to act in some manner, the Court clearly could not keep abreast of its work. In effect, we would be telling the parties that if they were not satisfied with the first decision, try again. However, on previous occasions, we have denied a petitioner's motion to vacate the decision and

> reconsider the opinion where the only basis for these motions was the petitioner's unexcused failure to raise certain issues earlier.

Similarly, in *Selwyn Operating Corp. v. Commissioner*, 11 B.T.A. 593, 595 (1928), we observed:

> A party is entitled to have his day in court; both parties are entitled to this, but neither party is entitled to have more than one fair, reasonable opportunity to establish his claim or defense. To allow more would be to protract litigation to the extent which would preclude the administration of justice.

In other words, a party may not try his case with hindsight. *Long v. Commissioner*, 71 T.C. 724, 727 (1979), remanded on another issue 660 F.2d 416 (10th Cir. 1981).

II.

In their motion to vacate, petitioners take issue with the Court's enforcement of the standing pretrial order. Petitioners also allege violation of their Constitutional rights.

Our standing pretrial order, which was served on petitioners on February 4, 1998, requires, inter alia, that any documents or materials that a party expects to use at trial (except for impeachment), but which are not stipulated, be identified in writing and exchanged by the parties at least 15 days before the first day of the trial session. Materials that are not provided in compliance with our standing pretrial

order may be excluded from evidence. Rules 104(c)(2), 131(b) (formerly 132(b)); *Moretti v. Commissioner*, 77 F.3d 637, 644 (2d Cir. 1996); *Schaefer v. Commissioner*, T.C. Memo. 1998-163; *Polentarutti v. Commissioner*, T.C. Memo. 1998-113; *Kodak v. Commissioner*, T.C. Memo. 1991-485, affd. without published opinion 14 F.3d 47 (3d Cir. 1993). See Rule 143(b); *Owens v. Commissioner*, T.C. Memo. 1997-538, regarding an improper attempt to introduce evidence after the record has closed.

At the trial on Monday, April 27, 1998, the Court enforced its standing pretrial order when petitioners attempted to introduce into evidence materials that had not been provided in compliance with such order and after petitioners failed to establish good cause for such failure. As to petitioners' reason for failure to abide by the Court's pretrial order, we refer to the following excerpt from the trial transcript:

> THE COURT: * * * Now, have all of these receipts, Mr. Dumanis, been made available to Mr. Root?
>
> WITNESS MR. DUMANIS: Mr. Root just saw those receipts, the receipts themselves this morning when he just looked through them, but they were not given to him in advance for 15 day notice because my problem was that I didn't know what I should bring because I have just an enormous amount of different papers, and I was to supply any specific request with this regard, but I just couldn't know what I could bring.

Such reasoning does not constitute good cause for petitioners' failure to abide by our pretrial order. Although this Court provides pro se litigants some latitude in prosecuting their cases, we cannot allow such litigants to completely disregard the rules of practice and procedure established by this Court. Petitioners' case was set for trial two and a half months in advance. At that time, petitioners received the pretrial order and became aware of its requirements. Under these circumstances, even a pro se litigant cannot circumvent the good cause requirement for the reason that "I have just an enormous amount of different papers, and I was to supply any specific request with this regard, but I just couldn't know what I could bring."

Further, although we may be more lenient regarding what may constitute good cause for failure to abide by our pretrial order in the case of pro se litigants, we cannot allow such litigants by what appears to be bad faith or willful action, to prejudice respondent's case or disrupt the orderly and efficient trial of the case. See *Rapco, Inc. v. Commissioner*, 85 F.3d 950 (2nd Cir. 1996), affg. T.C. Memo. 1995-128. In this regard, we observe that petitioners did not simply attempt to produce a few pieces of evidence that they became aware of, through no fault of their own, at the last minute. Rather, petitioners sought to introduce a folder-full of hundreds of receipts that had apparently been in their possession all along. Petitioners did not provide respondent with this evidence until the morning of the trial. Respondent had no time to establish whether the receipts were authentic, incurred in relation to the businesses in question, or even to add them up. Obviously, petitioners' last minute introduction of such evidence would be prejudicial to respondent. Further,

petitioners' action also would disrupt the orderly and efficient trial of the case. It would take hours of the Court's time at trial to sort through, establish authenticity, determine admissibility, or add-up the receipts in question.

We addressed this Court's reasoning for enforcing the standing pretrial order in length at trial. The following excerpt from the trial transcript is illustrative of the rationale for our ruling:

> THE COURT: Mr. Dumanis, when this case was set for trial, the Court issued a trial notice, attached to which was a standing pre-trial order. And that order includes a number of directives to the parties, and those directives are set forth in our order for good reason. They are designed to insure that the parties cooperate fully in advance of trial in an effort to hopefully settle the case, but if the case cannot be settled, to get the case in shape so it can be properly presented to the Court.
>
> Now, one of the directives set forth in our standing pre-trial order is a requirement that the parties stipulate facts to the maximum extent possible and that the parties stipulate all documentary evidence, or at the very least, if there is some evidentiary problem why a [party] cannot stipulate all documentary evidence, that all documentary evidence be exchanged between the parties in advance of trial.
>
> And we do that for — we require this for several reasons. First of all, we require it because

of fundamental fairness so that each side has an opportunity to look at the other side's documents and consider them and be prepared for trial.

We also do it in the hopes that, with full disclosure, the parties are able to settle their case, as happens most of the time.

And, thirdly, we do it because the Court is simply not going to conduct an audit in the courtroom, that is not the purpose of a trial.

So our standing pre-trial order requires that the parties either stipulate all documentary evidence or, at the very least, exchange all documentary evidence at least 15 days before the date of trial. This, again, is done for the reasons that we have just indicated.

Now, our order is very clear, it provides, quote, "The Court may refuse to receive in evidence any document or material not so stipulated or exchanged unless otherwise agreed by the parties or allowed by the Court for a good cause show[n]." Close quote.

Now, you have just handed us a folder of receipts that, by our rough estimation, consists of approximately 300 receipts. Now, we are not going to sit here and go through 300 receipts.

MR. DUMANIS: Your Honor, may I say —

Appendix C

> THE COURT: And you have told us that the first time you made this available to [respondent's counsel] was this morning.
>
> MR. DUMANIS: That's correct. * * *

After review of the record, we adhere to our ruling at trial.

Petitioners also allege violation of their Constitutional rights. In this regard, petitioners contend that the notice of deficiency was arbitrary and capricious and that the audit was inadequately conducted.

At trial, we specifically addressed petitioners' contention regarding the notice of deficiency. We analyzed the notice of deficiency and explained to petitioners that this case basically involved substantiation:

> THE COURT: * * * Now, what you need to do here today is to demonstrate that these various expenses were in fact incurred by you, were paid by you, and that there was a business underlying these expenses. * * *

At trial, we ruled that the notice of deficiency was neither arbitrary nor capricious. After review of the record, we adhere to that ruling.

We also observe that a trial in this Court is not based on an administrative record but rather is a de novo proceeding. Accordingly, our redetermination of a taxpayer's liability is

based upon the record presented to us. For that reason, this Court generally will not look behind a notice of deficiency to examine evidence used or the propriety of the Commissioner's motives, or the administrative policy or procedures involved in making the Commissioner's determination. *Riland v. Commissioner*, 79 T.C. 185, 201 (1982); *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324, 327 (1974). Petitioners have not provided us with any persuasive reason to depart from this approach. Suffice it to say that by commencing the present case, petitioners have precluded respondent from assessing or collecting any deficiency in income tax until the decision of this Court has become final. Sec. 6213(a). See sec. 7485(a), (c).

III.

In their motion for reconsideration, petitioners essentially dispute a number of the Court's findings of fact and conclusions of law as set forth in the Court's bench opinion rendered on April 28, 1998. After review of the record, we adhere to our findings and conclusions. In so doing, we refer to paragraphs 7 through 25 of respondent's Notice of Objection to petitioners' motion for reconsideration, which substantially address most, if not all, of petitioners' objections.

Appendix C

IV.

Based on the foregoing, it is hereby

ORDERED that petitioners' Motion to Vacate Decision, filed June 11, 1998, and petitioners' Motion for Reconsideration of Opinion, filed July 1, 1998, are both denied.

s/ Robert N. Armen, Jr.
Robert N. Armen, Jr.
Special Trial Judge

Dated: Washington, D.C.
August 12, 1998

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 4, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th Day of February, two thousand.

Dkt No: 98-4350

Dumanis

v

CIR

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant.

Upon consideration by the panel that decided the appeal, it is ordered that said petition for rehearing is **DENIED.**

Appendix D

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney